

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

<b>UNITED STATES OF AMERICA,</b>	)	<b>CASE NO. 8:08CR210</b>
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>MEMORANDUM</b>
	)	<b>AND ORDER</b>
<b>TERRY RAY BAIN,</b>	)	
	)	
<b>Defendant.</b>	)	

This matter is before the Court on the Defendant's appeal (Filing No. 117) from the Magistrate Judge's order (Filing No. 113) denying the Defendant's motion to file, renew and supplement pretrial motions (Filing No. 112).

**FACTUAL BACKGROUND**

On May 22, 2008, the Defendant, Terry Ray Bain, was charged in a seven-count Indictment alleging various offenses relating to a conspiracy involving the alleged interstate transportation of stolen goods. (Filing No. 1.) The original pretrial motion deadline of June 19, 2008, was extended until August 18, 2008, at Bain's request. Bain timely filed eleven pretrial motions that were heard by Magistrate Judge Thomas D. Thalken in a two-day hearing on December 3 and 4, 2008.<sup>1</sup> All motions were denied, some without prejudice to reassertion if the need arises or at trial.

On January 22, 2009, a Superseding Indictment was filed, naming a codefendant, Marty Hiram Ellis. (Filing No. 74.) Other than naming Ellis, the Superseding Indictment appears to include few changes.

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<sup>1</sup>The hearing was continued on defense counsel's motion.

Bain moved to continue his pretrial motion deadline “until 15 days after co-defendant Marty Hiram Ellis is required to file his pretrial motions in this case.” (Filing No. 99.) Judge Thalken granted the motion, stating that “[t]he deadline will be established during the arraignment of a co-defendant on May 26, 2009.” (Filing No. 100.) That date was set in Ellis’s progression order as June 15, 2009. (Filing No. 108.) Bain did not object to or appeal from either order. On June 16, 2009, Bain filed a motion to extend his pretrial motion deadline to June 30, 2009, acknowledging that he incorrectly assumed that when Ellis’s pretrial motion deadline was set at June 15, 2009, Bain had until June 30, 2009, to file or renew pretrial motions. He candidly acknowledged that his purpose in having a later deadline was to piggyback onto motions that might be filed by Ellis. (Filing No. 112, p 7.) Bain’s counsel states that he did not realize his error until trial was scheduled for July 21, 2009. (*Id.*, ¶ 8.)

Magistrate Judge F.A. Gossett denied the motion, stating:

The defendant has not filed an affidavit or declaration regarding speedy trial, as required by NECrimR 12.1 and/or 12.3. The movant has been given several extensions of time in which to file motions, the latest of which was to be established at the time of defendant Ellis’ arraignment on May 26, 2009. The record shows that the pretrial motion deadline was set for June 15, 2009 at the time of Ellis’ arraignment, the movant was given notice of that deadline, and the movant did not file any pretrial motions as of the June 15, 2009. The court finds that defendant Bain has not shown good cause for the continuance requested.

(Filing No. 13.)

Bain appeals from this order.

## **DISCUSSION**

Pursuant to 28 U.S.C. § 636(b)(1)(A) and NECrimR 57.2, the court has reviewed the order from which this appeal has been taken. In an appeal from a magistrate judge's order

on a pretrial matter within 28 U.S.C. § 636(b)(1)(A), a district court may set aside any part of the magistrate judge's order shown to be clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); NECrimR 57.2(c).

Bain's earlier motions have been thoroughly considered. If appropriate, some may be renewed as specified. The Court appreciates defense counsel's candor in acknowledging that he erred in assuming that he had two weeks after Ellis's deadline to file or renew motions on Bain's behalf. However, Judge Gossett's order is neither clearly erroneous nor contrary to law in stating the grounds for denying Bain's motion to continue his deadline.

### **CONCLUSION**

For these reasons, the appeal is denied.

IT IS ORDERED:

1. The Defendant's appeal from the Magistrate Judge's Order (Filing No. 117) is denied; and
2. The Magistrate Judge's Order denying the Defendant's motion to continue (Filing No. 113), is affirmed.

DATED this 26<sup>th</sup> day of June, 2009.

BY THE COURT:

s/Laurie Smith Camp  
United States District Judge